UNREPORTED

DECISIONS

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

SERVICE CORPORATION OF WESTOVER HILLS, Plaintiff,
v.
Robert GUZZETTA and Kathleen S. Guzzetta, Defendants.

Civil Action No. 2922–VCP.
|
Submitted: April 8, 2011.
|
Decided: July 21, 2011.

Attorneys and Law Firms

Richard H. Cross, Jr., Esq., Cross & Simon, Llc, Wilmington, Delaware, for Plaintiff.

Thomas C. Marconi, Esq., Losco & Marconi, P.A., Wilmington, Delaware, for Defendants.

MEMORANDUM OPINION

PARSONS, Vice Chancellor.

***1** This dispute arises from a preliminary injunction preventing Defendants, Robert and Kathleen Guzzetta (the "Guzzettas"), from demolishing a house on property they purchased in the Westover Hills Section C housing development ("Westover Hills") and converting it to a grassy play area for their children. Ultimately, however, the Court denied a permanent injunction. The Court also awarded the Guzzettas damages in the full amount of the accompanying injunction bond, which was $10,000.

The Guzzettas appealed the amount of the bond and the related damages award. The Supreme Court reversed the award of $10,000 in damages based largely on its conclusion that this Court had not adequately explained its decision to limit the preliminary injunction bond to $10,000.[1]

This matter is before me on remand for further action in accordance with the Supreme Court's decision. After careful consideration of the parties' arguments, briefs, and supporting submissions, and for the reasons stated in this Memorandum Opinion, I have decided to set the injunction bond at $26,353 and, if necessary, to hold an evidentiary hearing promptly to determine the Guzzettas' damages.

I. BACKGROUND

A. The Parties

Plaintiff, Service Corporation of Westover Hills ("Service Corp."), is a Delaware not-for-profit corporation consisting of the landowners within Westover Hills.

The Guzzettas are homeowners in Westover Hills and have lived at 905 Berkeley Road since 1996. In 2007, they purchased the adjacent, disputed property at 924 Stuart Road (the "Property")[2]

B. Facts[3]

Properties in Westover Hills are subject to restrictive covenants ("the Covenants"). Arguably due to such restrictions and regulation by Service Corp., the development currently is populated by stately houses with similar styling and mature landscaping. The Covenants are enforceable by Service Corp. via assignment from the Delaware Land Development Corporation.

In early 2007, Service Corp. discovered that the then-owners of the Property, William and Kathleen Rubbert (the "Rubberts"), sought to sell their property to the Guzzettas, who wanted to demolish the structure thereon in order to extend their yard and create a grass field on which their children could play. Service Corp.

expressed concern that such a field would be out of character with the neighborhood and sought to use its powers under the covenants to block any demolition by filing a complaint for injunctive relief on April 26, 2007 (the "Complaint"). Nonetheless, the Rubberts sold the Property to the Guzzettas on May 1, 2007.[4]

C. Procedural History

In its Complaint, Service Corp. sought a preliminary and permanent injunction preventing the Rubberts from destroying the improvements on the Property. In connection with the sale of the Property, Plaintiff amended the Complaint to substitute the Guzzettas for the Rubberts as Defendants. On May 3, 2007, I held a hearing on Plaintiff's Motion for a Temporary Restraining Order ("TRO") and soon after granted a TRO.

1. The TRO and Order for Giving of Security by Plaintiff

*2 After the issuance of the TRO, the Guzzettas moved, pursuant to Court of Chancery Rule 65(c),[5] for an order for the giving of security by Plaintiff (the "Bond Motion").[6] The Guzzettas requested that the security be set in the amount of $10,189.56 to cover increased demolition costs,[7] as well as additional property and school taxes assessed upon the improvements on the Property for the 2007–08 tax year.[8]

On May 24, 2007, I bifurcated the action such that any matters relating to trial were referred to Court of Chancery Master Ayvazian, while I continued to preside over matters relating to the form of the TRO and any preliminary injunctive relief.[9] On May 29, I required a secured bond in the amount of $5,000 and extended the TRO.[10] On June 15, 2007, after a hearing on Plaintiffs motion for preliminary injunction, I granted a preliminary injunction prohibiting the Guzzettas from "demolishing the house located at 907 Berkeley Road" or "cutting down any trees on that property without approval of Plaintiff or further Court ruling allowing such demolition or cutting to occur."[11]

2. Defendants' Petition to Increase Security

On September 22, 2008, Defendants filed a Petition to Increase Security Given by Plaintiff (the "Motion to Increase the Bond"). In addition to the costs claimed in their initial Bond Motion, the Guzzettas sought a bond sufficient to cover increased costs related to: landscaping and tree removal services; arborist services; school and property taxes for the 2008–09 fax year; sewer rents for the 2008 tax year; insurance premiums; Service Corp. dwelling test charges; time off from work; yellow caution tape; and interest on damages.[12] Including the potential damages they previously identified, the Guzzettas sought to raise the injunction bond to a total of $79,146.94.[13]

On October 30, 2008, I increased the amount of the secured bond to $10,000 based on the Guzzettas' claims that they would suffer potential damages based on, among other things, higher taxes and insurance costs and lost use of the Property.[14] I rejected Defendants' remaining estimated damages for various reasons, including: an insufficient showing of proximate cause as to the costs related to landscaping and arborist services, the absence of a legal foundation for the claimed costs relating to time spent responding to litigation, and a failure to show out-of-pocket damages that might support Defendants' claims for interest on damages.[15] The Guzzettas then moved for reargument as to the amount of the bond. I denied that motion on December 22, 2008, primarily on the ground that they failed to provide a legal theory that would support awarding them lost wages for time spent responding to the litigation.

3. Court of Chancery denies Permanent Injunction

On September 24, 2009, I heard oral argument on the objections to the Master's Report denying Service Corp.'s request for a permanent injunction. On December 22, 2009, I issued my opinion concurring with the Master's Final Report and finding that Plaintiff was not entitled to a permanent injunction.[16] Shortly thereafter, I entered a judgment awarding damages of $10,000 to Defendants for having been wrongfully enjoined, as well as attorneys' fees and costs of $60,000, under 10 Del. C. § 348. The Guzzettas then appealed to the Delaware Supreme Court, but only as to that portion of the Judgment that limited the damage award to $10,000.[17]

4. Delaware Supreme Court Reversal

*3 On November 9, 2010, the Delaware Supreme Court reversed this Court's award of damages and remanded this matter for further action in accordance with its decision.[18] It found that while this Court properly had excluded claims for damages related to landscaping and arborist services, time spent litigating the matter,[19] and interest on damages, it failed to provide a satisfactory explanation for raising the bond from $5,000 to only $10,000. In that regard, the Supreme Court observed that the Guzzettas had estimated that they would suffer more than $27,000 in damages that this Court had not excluded.[20]

This Memorandum Opinion constitutes my rulings on remand from the Supreme Court as to the appropriate amount of the bond and the resultant limit on Defendants' damages.

D. Parties' Contentions

The parties disagree as to the import of the Supreme Court's instructions on remand. In particular, they dispute the extent of the factual record that this Court may consult in setting the amount of the injunction bond, the proper bond amount, and the amount of damages this Court ultimately should award. Only the first two of these issues are currently before me.

Defendants argue that the injunction bond should be set at $93,351.32 and that Service Corp., therefore, should pay additional damages, beyond the $10,000 it already paid, of $83,351.32 plus interest. Specifically, the Guzzettas assert that this Court should reevaluate the amount of the injunction bond *de novo,* keeping in mind that the purpose of Rule 65(c) is to *fully* protect the enjoined party.[21] The Guzzettas assert that because "an enjoined party's damages are not fully ascertainable until [a] court vacates the injunction," this Court should not limit its reevaluation to evidence presented in connection with Defendants' original Bond Motion and later Motion to Increase the Bond.[22] Instead, the Guzzettas urge the Court to set the bond liberally at a level likely to *meet or exceed* a reasonable estimate of potential damages, "erring on the high side."[23] Therefore, according to the Guzzettas, the injunction bond should be set at $93,351.32 so as to reflect *all* of their potential Rule 65(c) damages from the time of the TRO in May 2007 through January 2010, when the preliminary injunction was lifted.

Defendants also seek actual damages in an amount equal to the total bond they have requested, $93,351.32. In that regard, they argue that all of the damages included in Exhibit A to their opening brief on remand are causally and exclusively related to the existence of the injunction.[24]

Service Corp. urges the Court to set the injunction bond at the same level it did previously, *i.e.,* $10,000, and contends that it should not be required to pay any damages beyond the $10,000 it already has paid. Alternatively, Service Corp. argues that the maximum amount the bond can be is $27,953.69, which is the sum of all the items it requested in its Motion to Increase the Bond minus the categories this Court explicitly excluded.[25] According to Service Corp., this Court may consider only the evidence presented in support of Defendants' Bond Motion and the later Motion to Increase the Bond because the Supreme Court's Mandate only instructs the Court to explain on remand why it increased the bond from $5,000 to $10,000 *and not higher.*

*4 Service Corp. further argues that, regardless of the bond amount, this Court should affirm its damages award of $10,000. Service Corp. asserts that the Guzzettas have provided only four pages of support for their claims of $93,351.32 and most of their estimated damages lack a legal foundation for recovery or any evidentiary support.[26] Thus, Plaintiff requests that the Court either limit any damages award to the $10,000 it already has paid or require an evidentiary hearing or other proof that the Guzzettas actually incurred their claimed damages and that those damages are reasonable.

II. ANALYSIS

A. Standard for Setting an Injunction Bond

In any action to enjoin or restrain a party, Rule 65(c) requires that an applicant give security for the payment of "such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."[27] Under this Rule, trial courts have discretion to set the amount of security, which, as here, can be given in the form of a bond.[28] Because the amount of an injunction bond typically is set at a

relatively early stage in any given case, a determination of the amount of security adequate to protect the enjoined party is inherently an estimate.[29] Therefore, in exercising its discretion, a trial court must consider both the purpose of the security, which is to protect a wrongfully enjoined party from injunction-related damages,[30] and the need for estimated damages to be credible[31] or, in other words, based on factual evidence and plausible legal theories.[32] Generally, courts should "err on the high side" by setting the bond at a level likely to meet or exceed a reasonable estimate of potential damages,[33] as an enjoined party may only recover damages up to the amount of the injunction bond.[34] Indeed, one court observed that a party may be irreparably harmed if the court sets the bond limit far lower than the enjoined party's actual damages. *Mead,* 201 F.3d at 888 ("Unfortunately an error in the other direction produces irreparable injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond.").

The prescribed security, however, is intended to cover only those "costs and damages directly sustained as the result of an improvident issuance of the restraining order or preliminary injunction."[35] Thus, while Rule 65(c) does not require "the certainty of harm," it does seek to cover damages that may be incurred or suffered due to wrongful enjoinment.[36]

B. The Amount of the Injunction Bond

The Supreme Court remanded this action for further action in accordance with its decision reversing the award of damages in the full amount of the injunction bond ($10,000). It did so based on its determination that this Court had not explained its rationale for setting the amount of the bond well below the Guzzettas' unexcluded, estimated damages, which did not appear to be unreasonable.[37] The parties dispute whether this means that the Court is to reevaluate the amount of the bond based on the record presented in support of the Guzzettas' September 22, 2008 Motion to Increase the Bond or on the basis of the Guzzettas' current claim for damages. Therefore, I first address that issue and then turn to the question of the appropriate amount of the bond.

1. The record to be considered on remand as to the bond amount

*5 Service Corp. argues that the Court should reevaluate its ruling as to the amount of the bond based solely on the estimated damages presented to it in 2008 in connection with the Guzzettas' Motion to Increase the Bond. It further contends that, as a result, the upper limit for the bond is $27,953.69 because that is the total amount of the damages Defendants claimed in 2008 that were not excluded by this Court. By contrast, the Guzzettas assert that the Supreme Court did not intend this Court to "limit the bond and the damages claim to the October 2008 level...."[38] Thus, the Guzzettas urge the Court to reassess the amount of the bond based on the evidence of damages they recently presented for the period from May 2007, when the TRO was entered, until slightly after January 2010, when the preliminary injunction was vacated.

Having carefully reviewed the Supreme Court's opinion and the submissions of the parties, I conclude that Service Corp. is generally correct. The Supreme Court remanded this matter for further proceedings regarding the amount of the bond and, then, the amount of damages to which the Guzzettas are entitled. The parties do not dispute the "injunction bond rule"—*i.e.*, that the maximum damages a party may obtain for a wrongful injunction is the amount of the injunction bond. The only issue on appeal was whether the trial court abused its discretion in setting the amount of the bond. In holding that an error had been committed, the Supreme Court stated:

> If necessary, the trial court could conduct an evidentiary hearing to satisfy itself that there is some credible basis for the estimated damages. Having done so, a proper exercise of discretion would then require that the court explain its rationale for setting a bond at an amount well below the enjoined party's credible estimate of potential damages. The trial court did not provide such an explanation, and it does not appear from the record that the Guzzettas' remaining estimated damages are unreasonable.[39]

I read the Supreme Court's opinion as requiring this Court to reexamine the estimated damages presented in 2008 in light of the appellate decision, redetermine the appropriate amount of the bond, and explain the rationale for its decision. Thus, the relevant record is that which the Guzzettas presented in 2008.

In arguing for consideration of their current damages numbers, the Guzzettas conflate the setting of an injunction bond with the determination of damages. Their proposed approach is understandable based on the unusual procedural posture of this case, but it is not persuasive. Defendants cited no authority in support of their position. Furthermore, in cases involving the equivalent federal rule, Fed.R.Civ.P. 65(c), courts have denied *any* retroactive increase of injunction bonds.[40] The Seventh Circuit, for instance, has held that "there is neither logical nor legal room for a post-reversal increase in an injunction bond."[41] Here, allowing the Guzzettas to expand the record on remand would unfairly expose Plaintiff to greater liability than Defendants' Motion to Increase the Bond could have supported. Because enjoined parties may recover only against the bond itself, it serves "generally to limit the applicant's liability and inform the applicant of the price of a wrongful injunction."[42] Thus, I have limited the relevant record on remand regarding the amount of the bond to the one created in connection with the Guzzettas' Motion to Increase the Bond.

*6 I now turn to an examination of the estimated damages the Guzzettas presented in that context to determine the appropriate amount of the bond.

2. Rejected damages

The Guzzettas presented estimates of damages relating to landscaping and arborist services, time spent litigating this matter, and interest on damages in support of their Motion to Increase the Bond.[43] I explicitly rejected these costs in my Order increasing the bond to $10,000,[44] and the Supreme Court affirmed those rulings.[45]

For the same reasons, on remand, I decline to include any estimated damages in these categories in the new injunction bond amount.

3. Other categories of estimated damages

In support of their Motion to Increase the Bond, the Guzzettas identified several other items of estimated damages. After affirming the exclusion of the three items mentioned above, the Supreme Court observed that "it does not appear from the record that the Guzzettas' remaining estimated damages are unreasonable."[46] In addition, the Court stated that "in order to fully protect the enjoined party, the trial court should set the bond at a level likely to meet or exceed a reasonable estimate of potential damages" and should "err on the high side" in doing so.[47] With these statements in mind, I next examine, in turn, each of the other categories of estimated damages the Guzzettas advanced.

a. School and county taxes

The Guzzettas presented credible evidence of potential damages in terms of increased school and county taxes due to the presence of a house on the Property during the period they were enjoined from demolishing it and creating, instead, a grassy playfield for their children.

At the time of the Motion to Increase the Bond in September 2008, the Guzzettas claimed they had incurred $8,123.63 in additional New Castle County school and county property taxes (the "Taxes") as a result of the injunction.[48] By the time they moved to increase the bond, the Guzzettas had been enjoined from demolishing the improvements on the Property for approximately sixteen months. As of that time, Master Ayvazian had conducted a trial and rendered her Draft Report. The parties were in the midst of briefing various exceptions to that report pursuant to Court of Chancery Rule 144. Thereafter, the Master would need to consider those exceptions and issue her Final Report, after which the parties could file objections with this Court and litigate those issues before me. In these circumstances, I consider it reasonable to assume that it might have taken as much as another year for the Guzzettas to obtain a final ruling on the validity of the injunction. Consequently, I would expect Defendants' estimated potential damages to include Taxes for the 2009–2010 tax year, which would have accrued on July 1, 2009. Accordingly, I find that it is reasonable to include in the amount of the bond a total of $12,000 in estimated damages to account for three years of increased Taxes.

b. Insurance

*7 In support of their Motion to Increase the Bond, the Guzzettas alleged that they had paid premiums of $1,564

for Chubb Insurance on the improvements on the Property for the sixteen-month period from May 2007 to September 2008.[49] Assuming for the reasons discussed above that it might take another year for the Guzzettas to complete their challenge to the injunction, I estimate the potential insurance-related damages to be $2,737 (using the same average monthly rate of premium over a twenty-eight month period). Therefore, I also will include that amount in the bond.

c. Lost use of the Property

Defendants estimated in their Motion to Increase the Bond that they would suffer damages of $8,500 due to their inability to use the Property as a playfield, as they intended, until the injunction was lifted. In my Order increasing the initial bond to $10,000, I stated that the Guzzettas' loss of use claim should be discounted because they had not presented any specific facts in support of it.[50] I am mindful, however, that the Supreme Court, referring generally to the damages items I had not specifically excluded, one of which was for the lost use of the Property, stated that those estimated damages did not appear unreasonable.

Therefore, applying the "credibility" standard referenced by the Supreme Court,[51] I find that the Guzzettas' estimate of $8,500 for lost use of the Property is overstated and lacks factual support. Based on the record available, I consider $5,000 or slightly over $2,000 per year to be a reasonable estimate of the potential loss to the Guzzettas caused by their inability to use the entire Property, as opposed to only the area around the existing structure, as a "play area" for their children during the enjoinment period. Thus, the bond will include $5,000 to account for that category of potential damages.

d. Sewer rents and Service Corp. dwelling test charges

Defendants also relied on several categories of potential damages in their Motion to Increase the Bond that neither this Court nor the Supreme Court addressed in any detail. Two of these categories are sewer rents and Service Corp. dwelling test charges. Specifically, the Guzzettas* Motion identified as indicative of potential damages a New Castle County sewer utility charge in 2008 of $92.07 and "6 mo. Dwelling test charges" from Service Corp. in 2007–08 of $450.00 and in 2008–09 of $666.00.[52]

The Guzzettas' estimates for these claimed damages appear credible and reasonable; often sewer charges as to improvements are assessed and these claimed figures do not seem to be unusually high. Because Service Corp. has not disputed these charges, I have no reason to question Defendants' inclusion of them in their estimates of potential damages. The record, however, does not indicate sufficient information about these two categories of charges to justify extrapolating them into the future. Therefore, I will include in the amount of the bond estimated damages of $100 for sewer charges and $1,116 for Service Corp. dwelling test charges.

e. Increased demolition costs

***8** The Guzzettas alleged that they would suffer estimated damages of $8,000 as a result of increased costs for demolition by their contractors, Rosauri.[53] Defendants base this allegation on Exhibit A of the Bond Motion, a letter from Rosauri dated May 17, 2007 (the "Rosauri Letter"), indicating that a $6,500 discount Rosauri had offered would expire on May 30, 2007,[54] and adding a $1,500 fuel surcharge.[55]

The Rosauri Letter suggests that the Guzzettas obtained a favorable price for demolition of the structure on the Property in May 2007. They had purchased the Property on May 1, 2007, and this Court entered the TRO enjoining the demolition on May 3. Thus, the TRO precluded the Guzzettas from taking advantage of the discount. In addition, they arguably could have avoided the fuel surcharge if they had been able to proceed with the demolition before May 17, the date of the Rosauri Letter.

This evidence is credible, but it does not justify including the full $8,000 in estimated damages in the injunction bond. There is no reason to believe, for example, that the Guzzettas could not have obtained a relatively favorable demolition price in the future, if the injunction was vacated. Presumably, more than one company would have been capable of performing the demolition, and there is no evidence that Rosauri was the lowest bidder or an especially low cost provider. Moreover, October 30, 2008, the date I increased the bond, was at the height of the recent financial crisis. I consider it unlikely that market conditions in the following year or so would have

supported high pricing by suppliers of demolition services. Similarly, it is difficult to predict whether a fuel surcharge would be applicable at a future date, when the Guzzettas might be able to proceed with the planned demolition.

In setting the amount of the injunction bond, I have taken all of these factors into consideration, as well as the Supreme Court's comment that the remaining estimated damages did not appear unreasonable and its instruction to err on the high side in setting the bond. Based on these factors, I have decided to include an additional $5,000 in the amount of the bond to account for the possibility that the Guzzettas might have had to pay more for the demolition after the injunction was lifted.[56]

4. Summary of injunction bond reevaluation

In summary, for the reasons stated above, I am increasing the amount of the injunction bond to $26,353. The components of this amount are as follows:

Taxes	$12,000
Insurance	2,737
Lost use of the Property	5,000
Sewer rents	100
Service Corp. dwelling test charges	1,116
Increased demolition costs	5,000
Increased landscape removal costs	400
TOTAL	**$26,353**

As stated in the Supreme Court's opinion, this amount represents the maximum amount the Guzzettas can recover as damages based on the Court's ultimate denial of permanent injunctive relief.

C. Parties are entitled to an evidentiary hearing on damages

***9** Where a court has wrongfully enjoined a defendant, there exists a rebuttable presumption that the defendant may recover damages suffered as a result.[57] Such a

defendant is entitled to an evidentiary hearing to prove both the extent of her injuries and that the injunction proximately caused those injuries.[58] At the hearing, the defendant must prove her damages and causation by a preponderance of the evidence.[59]

Here, the Court would hope that the parties might reach agreement on the amount of the Guzzettas' damages, subject to their respective abilities to preserve any rights to appeal from the rulings reflected in this Memorandum Opinion. If so, they may submit an appropriate proposed judgment consented to as to form. If no such agreement is reached, counsel promptly should contact the Court to schedule an evidentiary hearing on Defendants' actual damages. To date, neither party has submitted affidavits or other competent evidence that would support an immediate award of damages. At any hearing on damages, the Guzzettas would not be limited to presenting evidence related solely to the damage categories I considered here in setting the amount of the injunction bond. Rather, they can proffer evidence of any legally cognizable damages they actually suffered as a result of being enjoined, but the maximum amount they may recover is the amount of the bond.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, the amount of the injunction bond entered on October 30, 2008, is increased to $26,353, with any later judgment for an award of damages above $10,000 to reflect a reduction of $10,000 to account for Plaintiffs prior payment.[60]

IT IS SO ORDERED.

All Citations

Not Reported in A.3d, 2011 WL 3307921

Footnotes

1 *Guzzetta v. Serv. Corp. of Westover Hills,* 7 A.3d 467, 471 (Del.2010).

2 This property was identified in the Complaint as 924 Stuart Road, but subsequently was renamed 907 Berkeley Road. Docket Item ("D.I.") 36, Pl.'s Op. Br. in Supp. of Prelim. Inj., at 5.

3 For the sake of brevity, I recite only the facts and background relevant to the current disputes regarding the bond and damages. For a full account of the facts of this case, see *Serv. Corp. of Westover Hills v. Guzzetta,* 2009 WL 5214876, at *1–3 (Del. Ch. Dec. 22, 2009).

4 D.I. 16, Defs.' Mot. to Intervene, ¶ 1.

5 This Rule states: "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the Court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Ct. Ch. R. 65(c).

6 D.I. 23, Defs.' Mot. for an Order for the Giving of Security by Pl.

7 Defendants presented a letter from their demolition contractors, Rosauri Builders & Remodelers Inc. ("Rosauri"), notifying them of the revocation of a previously offered $6,500 discount and the addition of a $1,500 fuel surcharge to their previous estimate. *Id.* Ex. A.

8 Bond Mot. ¶ 9.

9 Master Ayvazian conducted a trial on October 30, 2007 and issued her Final Report on April 24, 2009, finding that Service Corp. was not entitled to a permanent injunction. D.I. 95, *Serv. Corp. of Westover Hills v. Guzzetta,* No. 2922–VCP (Del. Ch. Apr. 24, 2009) ("Master's Report").

10 D.I. 29, Order granting TRO, at 1–2.

11 D.I. 44, Order granting prelim. inj., at 1.

12 D.I. 77, Defs.' Pet. to Increase Security Given by Pl., Ex. A.

13 *Id.*

14 I discounted certain of Defendants' estimated damages, however. I reduced their estimate for lost use of property, for example, because it appeared to be overstated and not fully supported. D.I. 89, Order increasing security, at 2.

15 *Id.*

16 *Serv. Corp. of Westover Hills v. Guzzetta,* 2009 WL 5214876, at *11 (Del. Ch. Dec. 22, 2009).

17 D.I. 108, Defs.' Notice of Appeal to Del. Sup.Ct., at 1.

18 *Guzzetta,* 7 A.3d at 469, 471.

19 The Supreme Court stated that *Emerald P'rs v. Berlin,* 1998 WL 474195 (Del. Ch. Aug. 3, 1998), was inapposite on this issue because "there was nothing that the Guzzettas had to do but wait for the injunction to be lifted." *Guzzetta,* 7 A.3d at 471.

20 *Id.* at 470.

21 *Id.* at 469 (emphasis added); *Pargas, Inc. v. Empire Gas Corp.,* 423 F.Supp. 199, 243 (D.Md.1976).

22 D.I. 132, Defs.' Op. Br. Addressing Defs.' Damages Claims ("DOB"), at 5–6 (quoting *Guzzetta,* 7 A.3d at 470).

23 *Id.*

24 DOB 7.

25 Plaintiff calculates this figure by subtracting the rejected categories of damages this Court and the Supreme Court held were not compensable from the total amount of damages Defendants sought in their Motion to Increase the Bond. ($79,146.94–$51,193.25 = $27,953.69). D.I. 133, Pl.'s Op. Br. on Damages, at 8 n.35.

26 In its opinion remanding this case, the Supreme Court stated that: "The party seeking an injunction bond must support its application with 'facts of record or ... some realistic as opposed to a yet-unproven legal theory from which damages could flow to the party enjoined.' " *Guzzetta,* 7 A.3d at 470 (quoting *Petty v. Penntech Papers, Inc.,* 1975 WL 7481 at *1 (Del. Ch. Sept. 24, 1975)).

27 Ct. Ch. R. 65(c).

28 *See, e.g., Pargas,* 423 F.Supp. at 243.

29 *Id.* ("the amount of security adequate for a defendant's protection is a matter of estimate in light of the circumstances of the case...."); *Int'l Ladies' Garment Workers' Union (ILGWU) v. Donnelly Garment Co.,* 147 F.2d 246, 252–53 (8th Cir.1945) ("Necessarily, at the beginning of an action, the amount of security adequate for a defendant's protection is a matter of estimate.").

30 *Guzzetta,* 7 A.3d at 471.

31 *Id.* ("the trial court could conduct an evidentiary hearing to satisfy itself that there is a *credible basis* for the estimated damages.") (emphasis added).

32 *Id.* at 470 (quoting *Petty,* 1975 WL 7481, at *1).

33 *Id.; Mead Johnson & Co. v. Abbott Labs.,* 201 F.3d 883, 888 (7th Cir.2000), *amended on denial of reh'g,* 209 F.3d 1032, *cert. denied,* 531 U.S. 917 (2000).

34 *Guzzetta,* 7 A.3d at 469; *ILGWU,* 147 F.2d at 253 ("the defendants could not recover on any bond an amount in excess of the penalty of the bond nor for any liability except that stipulated in the bond.").

35 *Pargas,* 423 F.Supp. at 244 (internal quotations omitted) (quoting 7 JAMES WM MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 65.09 (2d ed.1975)). The language of Court of Chancery Rule 65(c) is virtually identical to that in Fed.R.Civ.P. 65(c).

36 *Interlink Int'l Fin. Servs., Inc. v. Block,* 145 F.Supp.2d 312, 318 (S.D.N.Y.2001).

37 *Guzzetta,* 7 A.3d at 471.

38 D.I. 136, Defs.' Reply Br. Addressing Defs.' Damages Claim ("DRB"), at 1.

39 *Guzzetta,* 7 A.3d at 471.

40 *See Sprint Commc'ns Co. v. CAT Commc'ns Int'l, Inc.,* 335 F .3d 235, 241 (3d Cir.2003) ("Because the bond limits liability at the amount posted when the applicant accepted the preliminary injunction, the District Court erred in ordering a retroactive increase.").

41 *Mead Johnson & Co. v. Abbott Labs.,* 209 F.3d 1032, 1034 (7th Cir.2000).

42 *Sprint,* 335 F.3d at 240 n.5.

43 *See* Mot. to Increase the Bond Ex. A. The Guzzettas refer to these categories of damages again in their briefing on remand. DOB Ex. A.

44 Order increasing security, at 2.

45 *Guzzetta,* 7 A.3d at 470. In that regard, the Supreme Court expressly rejected Defendants' argument that *Emerald P'rs,* 1998 WL 474195, supported its estimated damages for time spent litigating. *Guzzetta,* 7 A.3d at 470.

46 *Id.* at 471.

47 *Id.* at 469, 470.

48 Due to the tax year calendar, the Guzzettas already had paid two years' worth of taxes by the time of their Motion. Each New Castle County tax year begins on July 1. Defendants were informed by the County that as long as the structure was standing on the property on the first day of the 2007–08 tax year, it would be counted as an improvement in calculating property and school taxes due on the property for that year. In the Bond Motion, the Guzzettas alleged that the amount of the Taxes attributable to the structure alone was 77% and, therefore, $2,189.56 of the $2,843.58 paid in property and school taxes in the 2006–07 tax year would have been for the structure. Bond Mot. ¶ 9. In their Motion to Increase the Bond, the Guzzettas separately listed county and school taxes for each of the tax years 2007–08 and 2008–09 with a notation "higher annual taxes vs. lot." Mot. to Increase the Bond Ex. A. It is not clear whether the amounts listed represent the full amount of the tax charges of which only 77% would be attributable to the structure that the Guzzettas sought to demolish or just the increased taxes that would not have been due if the structure had been removed. The notation suggests the latter, so I have used those figures in determining the amount

of the bond. If that is incorrect, Defendants' damages for Taxes would be limited to the increased amount due to the presence of the structure on the Property during the period of the injunction.

49 Insurance was required by the Guzzettas' mortgage company. DOB 5.

50 Order increasing security, at 2 ("the argument based on damages resulting from lost use of property appears overstated and lacks detailed factual support; therefore, the amount of those potential damages must be discounted.").

51 *Guzzetta v. Serv. Corp. of Westover Hills,* 7 A.3d 467, 471 (Del.2010) ("If necessary, the trial court could conduct an evidentiary hearing to satisfy itself that there is some *credible* basis for the estimated damages.") (emphasis added).

52 Mot. to Increase Bond Ex. A.

53 Bond Mot. Ex. A; Mot. to Increase Bond Ex. A.

54 Bond Mot. Ex. A ("[the] discount was offered ... mainly due to our availability to start and complete the demolition of 924 Stuart Road in May of 2007.").

55 Rosauri advised the Guzzettas that the fuel surcharge resulted from an increase in fuel charges it had received in May 2007 from its "Haulers and Excavators." The letter also stated that it was a 5% surcharge, suggesting that the expected cost of the demolition would be in the range of $30,000, *Id.*

56 For similar reasons, I also have included in the new bond $400 attributable to the Guzzettas' assertion in connection with their Motion to Increase the Bond that they would incur increased costs of $550 for landscape removal. I discounted that amount for the same reasons as for the estimated increased charges for the demolition work.

I decline, however, to include any amount for the immaterial expenses related to the "yellow caution tape."

57 *Emerald P'rs,* 1998 WL 474195, at *3.

58 *Id.*

59 *Id.; see also Pargas,* 423 F.Supp. at 244 ("the amount of damages which defendants can in any event recover for an inappropriately entered injunction must be shown to have been proximately caused by the injunction and may not be based upon speculation or conjecture.").

60 Service Corp. already has paid $10,000 in damages to the Guzzettas in accordance with this Court's earlier Judgment. *See* D.I. 107; DRB 6.

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Court of Chancery of Delaware.

Susan Hough DONOVAN, Petitioner,
v.
Frederick P. WHITNEY, Executor of the Estate of Mary Louis Hieber; Sara P. Fitzgerald, Executrix of the Estate of Mary Louise Hieber; Jane McCabe, Executrix of the Estate of Mary Louis Hieber; Bethany Beach Fire Company; Bascom Palmer Children's Eye Clinic; John Scott Spargo; Grace Ann Spargo; Nan Beeks; Agnes M. Derickson; John Wheeler Spargo; Sara P. Fitzgerald; and Robert H. Fitzgerald, Defendants.

No. CIV.A. 1154-K-20.

Draft Report: Aug. 17, 1992.

Final Report: Oct. 16, 1992.

Attorneys and Law Firms

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MASTER'S REPORT

KIGER, Master.

***1** This is a report on a number of competing motions. Susan Hough Donovan and the Spargo-Beeks heirs have filed motions for summary judgment. I recommend that Mrs. Donovan's motion be denied and that the Spargo-Beeks motion be granted. I also recommend that the Derickson motion to dismiss be granted in part. Finally, I recommend that the personal representatives's suggested plan for distribution of the estate, as set forth in their motion for instructions, be approved.

I.

Background

The background information is taken from the statements of fact offered by the parties in their respective briefs. This information is assumed to be true for purposes of this proceeding. *Grobow v. Perot,* Del.Supr., 539 A.2d 180 (1988).

Mary Louis Hieber never married, nor did she have children. John Scott Spargo, John Wheeler Spargo, Nan Beeks and Susan Hough Donovan are the heirs who are related to Miss Hieber.

Miss Hieber made several wills in the last years of her life. In a will dated November 15, 1984, she left her residuary estate to Mrs. Donovan and to Hope Bennett Smith. Paragraph First of that will directs the personal representatives to pay "all inheritance and transfer taxes". On December 19, 1984, Miss Hieber executed a new will. To a great extent this will is an elaboration on the previous one. It also directs the personal representatives to pay "all inheritance and transfer taxes", but appears to be more generous to Mrs. Donovan in the residuary clause at the expense of Miss Smith.

The last will is the one at issue here. It was executed on May 5, 1989. It also directs the personal representatives (not the same people as in the two previous wills) to pay "all inheritance and transfer taxes", but differs from the two previous wills in two respects important to this case. First, it makes Mrs. Donovan the sole residuary heir. Second, it directs

> that all Federal, and other legacy, inheritance, State, succession, and transfer taxes, and all charges in the nature thereof, payable by reason of my death, whether upon or upon reason of any bequest or devise contained in this my Last Will and Testament, or by reason of the Trusts hereinbefore created, or the share of shares of any of the beneficiaries thereof, or upon any property included in my taxable estate, including, but not limited to the proceeds of life insurance, shall be paid and discharged in full by my Executor and Executrices out of the corpus of my residuary estate, and shall be and constitute a charge there against, rather than against the individual legatee, devisee, or beneficiary, so that each beneficiary or participant shall receive his or her entire legacy, devise, or other property without impairment or deduction because of any such tax.

Miss Hieber died on July 6, 1989. Her estate at the time of her death was worth $3,308,684.34. The break-down of this figure shows real estate valued at $882,000.00; stocks and bonds valued at $1,630,867.76; mortgages, notes and cash worth $424,279.06; jointly owned property worth $236,193.95; and miscellaneous property of $35,346.57. The personal representatives could choose one of two dates on which to value the estate for inheritance tax purposes, either the date of death or a date six months following. After determining the consequences attendant on both choices, the personal representatives chose the date of death value of the estate.

***2** Once the specific bequests and devises are accounted for, the residuary estate bequeathed to Mrs. Donovan comes to $1,221,814.21. Federal estate taxes, however, came to $946,312.82, and Delaware inheritance taxes came to $290,028.58, for a total tax liability of $1,236,341.40. This wipes out the residuary estate and leaves a deficit of $14,527.19. A tax penalty of $3,727.18 for federal taxes brings the deficit to $18,254.37. The personal representatives take the position that the residuary estate is liable for these costs to the extent it is available to pay them, and that the short-fall should be apportioned among the non-residuary legatees proportionately so that their legacies are somewhat diminished. If this is done Mrs. Donovan receives nothing. Mrs. Donovan's position is that the tax payment clause of the will is inoperative and, as a result, all heirs bear some portion of the tax liability for this estate. Her position is based on opinions in *Zecca v. Zecca,* New Castle County Register of Wills No. 75346, Marvel, C. (Jan. 7, 1981 and June 23, 1981). Thus, if Mrs. Donovan prevails, the shares of all the other heirs will be diminished and she will receive a sizeable inheritance, nearly $750,000.00.

Another issue presented in this estate is whether a jointly-held bank account should be part of the estate or treated as a true joint tenancy, and thus passing outside the estate. That issue will be discussed in more detail below.

II.

Evidentiary Issues

It must be noted at the outset that any court's ability to construe a will is restricted by the principle that, absent patent ambiguity or a finding of latent ambiguity, extrinsic evidence may not be considered to determine the testator's intent. For lengthy discussions of what is involved in admitting or excluding extrinsic evidence, including the testimony of the scrivener, *see In the Matter of the Estate of Gerard V. Higgins,* Del. Ch., Register of Wills Folio No. 99104, Kiger, Master (Mar. 16, 1992); and *In the Matter of the Estate of Rebecca Scotten Whiteman,* Del. Ch., Register of Wills Folio No. 97615, Kiger, Master (Apr. 9, 1992). These observations need to be made because the parties have included in their briefs frequent references to what people, including Miss Hieber, said to one another. There are also references to what Miss Hieber knew or should have known, and how she expected or wanted things to turn out with respect to the distribution of her estate. In terms of the statements of facts in the briefs, one might almost think this proceeding

was a will challenge. A will challenge, of course, is not before the Court because the time passed in which one might be brought and, moreover, it is not necessarily in Mrs. Donovan's interests to challenge the will itself. If she were to have done so successfully, presumably an intestacy would have resulted if the doctrine of dependent relative revocation (*see Estate of Jennie T. Stanton,* Del. Ch., C.A. No. 1219 (Sussex Co.), Kiger, Master (May 1, 1987) and 33 *Harvard Law Review* 337 (1920)) did not apply, which could mean that her entitlement to share in the estate would be eliminated. If a prior will were to be revived, the result might be that Mrs. Donovan is less well off than if she receives a favorable construction of the 1989 will. Hence, it is probably in Mrs. Donovan's interests not to invalidate the last will, but to seek a favorable construction of it.

***3** I do not see that there is any ambiguity in the will, latent or patent, and therefore the extrinsic evidence is inadmissible. Consequently, I view this proceeding as being essentially one involving a question of law, that is, must the tax apportionment clause of a will fail when events subsequent to the death of the testatrix establish that the fund from which the taxes are to be paid is insufficient for that purpose.

III.

The Tax Payment Clause

Mrs. Donovan's case proceeds on the assumption that the opinion in *Zecca* is binding precedent. It is not. In order to rise to the level of *stare decisis,* an opinion must be reported. *State v. Phillips,* Del. Ch., 400 A.2d 299 (1979); *Aprahamian v. HBO & Co.,* Del. Ch., C.A. No. 8989, Hartnett, V.C. (May 14, 1987, *revised* May 28, 1987). *See also Jones v. Superintendent, Virginia State Farm,* C.A. 4, 465 F.2d 1091 (1972); *State v. Fitzpatrick,* WA Ct.App., 491 P.2d 262 (1972); *Bumiller v. Walker,* Oh.Supr., 116 N.E. 797 (1917), LRA 18B, 96; 14 Am.Jur. Courts, § 77; *Southern Guar. Ins. v. Cotton States Mut.,* GA App., 335 S.E.2d 598 (1985); *Taco Bell v. City of Mission,* Kan.Supr., 678 P.2d 133 (1984); *Tampinen v. Aetna Cas. and Sur. Co.,* WI Supr., 327 N.W.2d 55 (1982); *Stine v. Continental Cas. Co.,* MI Supr., 349 N.W.2d 127 (1984); *Charatan v. Board of Review,* N.J.Super. A. D., 490 A.2d 352 (1985); *Nicholson v. Yamaha,* Md.App., 566 A.2d 135 (1989), *cert. denied,* 569 A.2d 1242 (1990); *Com. v. Sperry,* Pa.Super., 577 A.2d 603 (1990). *Zecca* is unreported. Therefore, *Zecca* is not a starting point for any discussion of this issue, but a case that must be considered before closing the discussion. The starting point is the will itself.

The language of the will is quite clear. It expresses a wish that the gifts made to individual legatees and devisees not be diminished by the payment of what may be described collectively as death duties. The personal representatives are, therefore, directed to pay these sums from the residuary estate. It must not be overlooked that a conscious choice has been made by the testatrix: by recognizing that someone's share of the estate will have to suffer in order for the death duties to be paid, the testatrix has decided that the burden of paying these costs shall fall upon the residuary estate, with a consequent diminution of its size. In other words, she had to know that the residuary estate was not a fixed sum and might be very small or non-existent. In this sense, Mrs. Donovan's gift was by its nature a contingent gift, the contingency being that there be money to distribute to her at the close of the estate.

The controlling statute is 12 *Del. C.* § 2906. Section 2901 mandates the proration of state and federal estate taxes subject to the exceptions set forth in Section 2906. Section 2906 states in pertinent part that "The foregoing provisions of this chapter shall not apply where and *to the extent* that a testator provides in his will for another method of apportionment or allocation of the taxes referred to in § 2901 of this title ...." (Emphasis supplied.) The clear import of this language is that when a testator sets aside a fund from which estate and inheritance taxes are to be paid, that fund should be used "to the extent" that it is available and, should it be insufficient to pay all the taxes owing, the special exception to § 2901 created by § 2906 ceases to apply after the fund is exhausted. Any other reading of § 2906 effectively guts it, a result that is at variance with the principle that all portions of a statute will be given effect if possible. *See Thomas v. Veltre,* Del.Supr., 381 A.2d 245 (1977); *State ex rel. Price v. 0.0673 Acres of Land, More or Less, In Baltimore Hundred, Sussex County,* Del.Supr., 224 A.2d 598 (1966). A court must give effect to the law as set forth in a statute by the General Assembly, *Bryerton v. Matthews,* Del.Super., 188 A.2d 228 (1963), *aff'd in part, rev. in part,* 193 A.2d 83 (1963), and may not engage in statutory construction when the statute is plain on its face, *State v. Ross,* Del. Gen. Sess., 50 A.2d 410 (1947), as is the case with this statute.

***4** Mrs. Donovan and the other movants refer to *In Re*

Will of Ashbrook, Del. Ch., 291 A.2d 301 (1972); *Carlisle v. Delaware Trust Co.,* Del.Supr., 99 A.2d 764 (1953); and *Wilmington Trust Co. v. Copeland,* Del.Supr., 94 A.2d 703 (1953) for general propositions of law in support of their respective positions, but none of these cases is particularly helpful in analyzing this specific case. Far more useful is the discussion at 69 A.L.R.3rd 122, Anno., *Construction and Effect of Will Provisions Expressly Relating to the Burden of Estate or Inheritance Taxes,* at § 43, which, unfortunately, has nothing specific to say about the state of the law in Delaware on these matters.

Turning now to *Zecca,* several observations are in order. First, unlike the present case, the personal representative and the residuary beneficiary (who was well provided for elsewhere in the will as well as in the residuary clause) were the same person, the testator's son Joseph. The language of the tax allocation clause in *Zecca* placed a burden on Joseph, in his dual capacity, that he could not reasonably discharge. The clause in question states that

> TENTH: All legacy, succession, inheritance, transfer and estate taxes levied or assessed upon or with respect to any property or any interest in property, legal or equitable, which is included as part of my gross estate for the purpose of any such tax, shall be paid by the Executor of this my Will out of my estate in the same manner as an expense of administration and shall not be prorated or apportioned among or charged against the respective interest of any devisee, legatee, beneficiary, transferee or other recipient, nor charged against any property passing or which may have passed to a ny [sic] of them, and that the Executor of this my Will shall not be entitled to contribution or reimbursement for any portion of any such tax from any such person, any statute or rule of law to the contrary notwithstanding.

This language places a duty on Joseph, as executor, to pay the various taxes owed from his inheritance as residuary beneficiary, but apparently forbids him to apportion among the specific donees (including himself) the portion of the taxes over and above the value of the residuary estate or to seek contribution or reimbursement from them for the additional amount. In light of the fact that the taxes were greater than the residuary estate, one is left to wonder whether the prohibition applied to collection of all such taxes from the non-residuary heirs, or just such taxes as could not be paid from the residuary estate. The will gives no guidance on this point.

As pointed out by the Spargo-Beeks heirs, the Hieber will differs from the Zecca will in that it does not forbid proration or apportionment of taxes, but merely directs that they be paid from the residuary estate "so that each beneficiary or participant shall receive his or her entire legacy, devise or other property without impairment or deduction because of any such tax." This is very different from, in essence, forbidding compliance with applicable law should the residuary estate be insufficient to pay the charges upon it.

***5** I also note, for what it is worth, that nowhere does the Zecca will allot the taxes to the residuary estate; the taxes are to be paid "out of my estate," a direction which the Court and counsel necessarily had to construe as meaning the residuary estate. Miss Hieber, by contrast, did not leave the matter up in the air. She specifically said that the taxes were to be paid from an identified source, the residuary estate. When one begins to add up the differences between the Zecca and Hieber wills, the similarity, if any, begins to vanish, and what remains is the realization that two very different situations have been brought before the Court, neither one of which necessarily bears on the other or lends to any analysis of how the other should be handled.

The reasoning of *Zecca* is another aspect of that case that must be addressed. When one rereads the June 23, 1981 decision at the distance of a decade, what must have seemed clear to those handling the estate in 1981 is no longer clear at all; at least, it is not clear to me. The critical language is found on pages 9 and 10 of the June 23 slip opinion.

On page 9, the Court quotes from its January 27 opinion. Unfortunately, a typographical error refers to 7 A.L.R.2d 241. The correct citation is 71 A.L.R.3d 247, *Statute Apportioning Estate Taxes.* Section 21 thereof is concerned with apportionment when the tax clause in the will fails. In his general discussion of this subject, the author wrote that if the will directs that taxes be paid from the residuary estate, but there is no residuary estate, the clause fails. He goes on to say that

> In other cases there is a tentative residuary estate which is less than the total estate tax which the

> testator charges against the residuary estate. Here the court ordinarily gives effect to the tax clause by extinguishing the residuary estate in payment of the tax, and the excess is procured by allocation of the additional amount under the statute against all beneficiaries and the testamentary and non-testamentary property included in the taxable estate.

Id. (Footnotes omitted.) This passage seems to be at variance with the principles for which it is cited, but one must bear in mind that the citation appeared originally in the January opinion. The passage in which it appeared was then later quoted as a point of reference in the June decision. All that was decided in January was that summary judgment was inappropriate at that stage of the proceeding, that discovery would be allowed, and that the Court would reconsider the matter later.

Later was in June. What the Court did at that time was to treat other issues at length and then briefly address the apportionment issue in closing. It did so largely by distinguishing the will before it from the will in a 1949 New Hampshire decision cited by the opponents to the personal representative. I read the June opinion in *Zecca* as holding that a tax clause fails if the testator attempts to avoid the application of the tax apportionment laws (as is his right) and at the same time forbids the personal representative to seek any contribution or reimbursement from the specific donees, even though the fund charged with the payment of the taxes is insufficient for the purpose, and in setting forth these two purposes conjoins them so inextricably that neither can be carried out without slighting the other. In this fashion the personal representative is charged with an impossible task and, since the testator's wishes cannot be honored as expressed in the will, the clause fails as a matter of impossibility. If this is the correct view of the June opinion in *Zecca* (*i.e.,* that a personal representative cannot be made to do the impossible), it is harmonized with the January opinion and the sources cited therein and also with the main body of American law on this subject as discussed in 71 A.L.R.3d 274 and 69 A.L.R.3d 122. *See also In Re Estate of Thompson,* N.H.Supr., 386 A.2d 1280 (1978) and *cf. In Re Estate of Pyle,* Pa.Super., 570 A.2d 1074 (1990).

***6** Before leaving *Zecca,* it must be said that neither the January nor the June decision really discusses § 2906 or the meaning to be given the words "to the extent" or explores the implications of the holding being made. The absence from the opinion of any such discussion is yet another reason not to rely on it generally or to give it any deference in this case. *See Aprahamian, supra.*

Aside from the irrelevance of the holding in *Zecca* to the present case, there is also the problem of the implications, as a matter of principle and setting a precedent, of the position taken by Mrs. Donovan. If the tax assessment clause is held to be inoperative under a strained or attenuated view of local law (*cf. In Re Pyle, supra,* at 1078 as to "definitional gymnastics"), the fact that each heir bears his or her own taxes will lead to Mrs. Donovan receiving a sizable sum of money; about $750,000.00, after taxes, according to the figures in her opening brief. But what if the taxes came to $100.00 less than the residuary estate? Using Mrs. Donovan's reasoning, *Zecca* clearly would not apply and she would be entitled only to $100.00. Similarly, what if the residuary estate were $1.00, or what if the taxes matched the residuary estate to the penny? The result is the same, *Zecca* does not apply. The point is this: if the terms of the will are honored, there is at least one constant in the picture, that is, that the terms of a will should be carried out as fully as possible. If one begins to disregard the terms of a will because the result is not to one's liking, there is no fixity in the law and one may just as well disregard a testator's wishes because the bequest is small as because the bequest is nil.

I also note that Mrs. Donovan makes reference to general principles about the apportionment of taxes found in 30 *Del. C.* § 1344. Despite general principles that favor apportionment as set forth in this statute and 12 *Del. C.* § 2901 and as enunciated in the *Carlisle, Copeland* and *Ashbrook* cases, the fact remains that there is an explicit statutory authorization for deviation from these principles (*i.e.,* 12 *Del. C.* § 2906) and this is an instance where the specific controls the general. *Cf. Mergenthaler v. State,* Del.Supr., 239 A.2d 635 (1968).

In conclusion as to this issue, *Zecca* is unreported and, therefore, is not binding precedent. Although it may be deserving of deference in an appropriate case as a previous opinion of this Court, it need not be followed with respect to issues it did not fully consider or discuss. *Aprahamian, supra.* It did not discuss the meaning of the language "to the extent" as used in § 2906, nor did it explore the ramifications of its holding in the context of a will worded as Miss Hieber's was. Accordingly, *Zecca* should be confined to the facts set forth in the two letter opinions and as such the result in that case has no bearing on the present case. There being no issue of fact in this case, and based on a reading of § 2906 and the plain meaning of that statute, and based also on the express language of the Hieber will making use of the § 2906 exception, *see Carlisle, Copeland* and *Ashbrook, supra,* it

is my conclusion that under the terms of Miss Hieber's will the residuary estate must be exhausted before other estate assets can be used to pay taxes and, to the extent there is a shortfall, those other legacies bear proportionately their shares of the taxes under 12 *Del. C.* § 2901.

***7** Summary judgment is warranted when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." *Court of Chancery Rule 56; Perfect Photo Equities, Inc. v. American Corp.,* Del. Ch., 212 A.2d 808 (1965); *Nash v. Connell,* Del. Ch., 99 A.2d 242 (1953). Such is the case here. Therefore, for the reasons discussed above, summary judgment should be entered for the Spargo-Beeks heirs and denied as to Mrs. Donovan.

IV.

The Derickson Motion to Dismiss

One of the heirs not related to Miss Hieber is Agnes Derickson. Ms. Derickson is a beneficiary under the will and was also a joint owner with Miss Hieber of a bank account in the Baltimore Trust Company, a Delaware bank with offices in Bethany Beach, Delaware. The amount on deposit was $168,699.37 and the amount of the inheritance is $88,112.50.

At some point Mrs. Donovan became concerned about the way the estate was being administered and attempted to influence the personal representatives to claim the funds jointly held with Ms. Derickson. When they did not do so, she began to negotiate with Ms. Derickson rather than with the personal representatives. Mrs. Donovan was represented by an attorney in these negotiations as was Ms. Derickson. It is unclear to me what legal theories these parties relied upon in taking their respective positions, or why Ms. Derickson would offer Mrs. Donovan anything except for nuisance value, or what authority anyone attributed to Mrs. Donovan to allow her to interfere in the administration of this estate as she did, but the long and the short of it is that Ms. Derickson paid Mrs. Donovan $14,500.00 for a release of all future claims "against any of the funds on deposit in the joint bank accounts in Baltimore Trust Company in the names of 'Mary Louis Hieber and Agnes Derickson' or 'Mary Louis Hieber or Agnes Derickson' or any similar names." This release pertains to any claims the releasor, Mrs. Donovan, "ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this RELEASE." Ms. Derickson claims that as a result of accepting the money and executing the release, Mrs. Donovan is estopped from pursuing any claim against her, and so moves for dismissal of this action as to herself. Mrs. Donovan contends that the release is governed by the laws of Florida, since that is where the release was executed, and that under the laws of that State Ms. Derickson cannot claim to be exempt from suit in this action.

After reading the petition filed by Mrs. Donovan and the respective briefs on the Derickson motion to dismiss and Mrs. Donovan's motion for summary judgment, it still is not clear to me that Mrs. Donovan has any basis to claim that the jointly held bank funds are estate assets, nor does it appear that she does. Although the briefs proceed on the assumption that the bank funds are in issue, they have not been put in issue by the pleadings, and hence are not before the Court and cannot be considered. "[W]hat is determinative on this motion is not the [petitioner's] characterization of the complaint in [her] brief, but the pleading itself." *Alejandro and Reinholz v. Hornung, et al.,* Del. Ch., C.A. No. 12,442, Jacobs, V.C. (Aug. 12, 1992), at p. 7, fn. 4. The issue of the bank funds not being pled and thus properly brought before the Court, it cannot be adjudicated. Therefore, the Donovan complaint fails as to Ms. Derickson with respect to the bank funds for failure to state a claim, let alone one under which relief can be granted. Several other comments need to be made and can be offered in no particular order.

***8** 1. Mrs. Donovan is correct that the law to be applied in evaluating the release is the law of the place of execution, the State of Florida. *See Pauley Petroleum, Inc. v. Continental Oil Co .,* Del. Ch., 231 A.2d 450 (1967), *aff'd,* 239 A.2d 629 (1968). She is also correct that under *Ciliberti v. Ciliberti,* Fla.App., 416 So.2d 48 (1982), a release as a matter of general principle pertains only to claims that are mature at the time the release is given. The problem I have with this approach is that *Ciliberti* does not reproduce the language of the release, but does talk about fraud being practiced on the party giving the release. The present case does not appear to have any element of fraud, but it does have a release, apparently agreed on after arms' length negotiations between lawyers, that is broad as well as specific. Hence, with no other references to Florida law except a case that may be distinguishable to the point of being irrelevant, so far as one knows, I cannot offer an opinion as to the effect that

should be given this release.

2. Although Mrs. Donovan may have a statutory right to file actions for apportionment of taxes and for a decree of distribution, as I think it is clear she does, it is possible that she has forfeited that right. In other words, if the release is effective in shielding Ms. Derickson from suit by Mrs. Donovan, and if she is an essential party, as seems likely, Mrs. Donovan has created a situation in which this Court cannot afford full and effective relief and must, therefore, dismiss the actions. *See The Council of Civic Associations of Brandywine Hundred, Inc. v. New Castle County,* Del. Ch., C.A. No. 12,048, Hartnett, V.C. (Dec. 26, 1991). If Mrs. Donovan is, indeed, estopped from bringing Ms. Derickson into these actions and Ms. Derickson is an indispensable party, the actions must fail.

3. The Spargo-Beeks heirs contend that to the extent Mrs. Donovan may have released Ms. Derickson from these proceedings with respect to the bank funds, she has created the problem that besets her, *i.e.,* the failure of the residuary estate to cover the taxes. The jointly held $168,699.37 clearly would cover the $18,254.37 deficiency. The argument is, essentially, one of clean hands. It need not be resolved here as a result of other decisions made herein, but it is not an unpersuasive argument.

4. Inasmuch as the personal representatives have sought instructions on the distribution of the estate and in doing so have taken the position that the jointly held bank funds are not estate assets subject to proration or apportionment, but that the bequest to Ms. Derickson is an estate asset subject to proration or apportionment in order to pay taxes, Ms. Derickson is before this Court as to the bequest alone and is before the Court by action of the personal representatives. As stated above, she is not before the Court in connection with the bank funds through anything filed by Mrs. Donovan.

V.

The Petition for Instructions

***9** Part of this procedurally complex case is a request from the personal representatives for a decree of distribution. The strictures of 12 *Del. C.* §§ 2332 and 2333 have been observed in making the request. In line with the comments already made herein, I recommend that the plan of distribution proposed by the personal representatives in their letter of May 16, 1990, as amended by their letter of August 22, 1990, which takes account of the tax allotment issues raised herein, be implemented as being the correct formula for such distribution under Delaware law for the reasons set forth in those letters. Copies of the letters are attached hereto.

VI.

Conclusion

In conclusion, it is my recommendation that the tax apportionment clause of Miss Hieber's will be given full effect to the extent that funds are available and, to the extent that they are not, that distribution of the estate and apportionment of taxes take place as set forth in the May 16 and August 22, 1990 letters. I further recommend as a consequence of this first recommendation, that the Spargo-Beeks motion for summary judgment be granted and that the Donovan motion for summary judgment be denied. Lastly, I recommend that the Donovan action as to Ms. Derickson be dismissed to the extent that it does not deal with the bequest and that Ms. Derickson be recognized as being before the Court with respect to the bequest as a result of the personal representatives's request for instructions.

EXHIBIT A

May 16, 1990

FEDERAL EXPRESS

Mr. & Mrs. John S. Spargo

320 Hibiscus Drive

Miami Springs, FL 33166

Ms. Susan H. Donovan

2972 Mayfair Court

Clearwater, FL 34621

Ms. Nan E. Beeks

778 Winston Avenue

San Marino, CA 91108

Ms. Agnes M. Derickson

c/o Joseph Eisenger, Esq.

215 E. 68th Street

New York, N.Y. 10021

Mr. John Wheeler Spargo

3711 Center Way

Fairfax, VA 22033

Mr. & Mrs. Robert H. Fitzgerald

Box 333, Cedar Neck Road

Ocean View, DE 19970

RE: *Estate of Mary Louise Hieber*

Dear Heirs of Mary Louise Hieber:
Please find enclosed copies of the following documents pertaining to the above estate, for which we are the executors:

1. Federal Estate Tax Return (Form 706);

2. Delaware Inheritance Tax Return (Form 600);

3. 1989 Final Federal Income Tax Return (Form 1040);

4. 1989 Final Delaware Income Tax Return (Form 200-01);

5. 1989 Federal Fiduciary Income Tax Return (Form 1041);

6. 1989 Delaware Fiduciary Income Tax Return (Form 400);

7. Summary of distributive shares of Mary Lou's estate, per heir;

8. Analysis of cash needs of the estate; and

9. Calculation of contributions required from heirs.

As you can see, the estate still owes federal estate tax in the sum of $136,312.82, upon which interest is now accruing at a per diem of approximately $41.09 (11%, compounded daily). The estate must also pay or reserve additional sums, as explained below:

***10** 1. Interest on the balance owed the IRS.

2. Estimated 1990 taxes for income earned by the estate. If less than reserved, such excess shall be repaid to the heirs in the same proportions as set forth in Item 9, above.

3. Additional legal fees for preparation and filing of tax returns, preparing schedules accompanying this letter and rendering tax advice to executors.

4. Reserve for increased valuation of assets, primarily Mary Lou's home, by IRS. Valuation increase of $50,000 times 55% marginal rate equals $27,500.

5. Specific charitable bequests ($10,000) and specific bequests to the Fitzgeralds ($35,000).

Because the funds immediately available to the estate are insufficient, each heir's share must be abated, as set forth in 12 *Del. C.* § 2317, the Delaware abatement statute (copy enclosed). We wish to give each heir the opportunity to either direct the sale of securities specifically bequeathed to them or to tender a *certified* check payable to "Estate of Mary Louise Hieber" for each heir's required contribution. The Fitzgeralds will have their required contribution deducted by the estate-no response is required from them (if John Scott Spargo or Grace Ann Spargo wish to have stock sold, they should designate which stock). To facilitate each heir's response, a consent form is enclosed. If we do not receive a response by 5:00 pm May 25, 1990, we will sell shares of stock bequeathed to an heir.

As some of you may know, there were not enough assets to pay all expenses, taxes, bequests and devises and yet leave anything to Susan H. Donovan, the residuary beneficiary. As is her right, Susan is considering challenging the tax apportionment clause of Mary Lou's will, which could cause the taxes to be reapportioned, perhaps on a pro-rata basis. If she does not institute a challenge or if she fails with such a challenge, abatement as set forth herein will still be required. If she succeeds in challenging the tax apportionment clause, none of you will pay (or have deducted from your share) *less* than the abatement set forth herein. Consequently, in order to reduce the interest cost to the IRS, we want to pay the remaining taxes now.

Please contact any of the undersigned with any questions. We look forward to receiving your consents.

ESTATE OF MARY LOUISE HIEBER

Distributive Shares of Heirs

John Scott Spargo and Grace Ann Spargo

AT & T	$ 76,245.75
Ameritech	37,381.50
Bell Atlantic	37,854.00
Bell South	46,473.75
Nynex	34,425.00
Pacific Telesis	34,992.00
Southwest Bell	33,574.50

l	U.S. West	30,537.00
i	One-half house	441,000.00
j	One-half household goods and furnishings	5,512.50
Subtotal		$ 777,996.00
	One-half to John Scott Spargo	$ 338,998.00
	One-half ot Grace Ann Spargo	$ 338,998.00

Nan E. Beeks

	Ensearch	$ 338,356.50

John Wheeler Spargo

	Enron (formerly Internorth)	$ 119,224.50

One-half house	441,000.00
One-half household goods and furnishings	5,512.50
Total	$ 565,737.00

Sara P. Fitzgerald

One-half Washington Water Power Co.	$ 1,484.38
One-half $35,000.00	17,500.00
Total	$ 18,984.38

Robert H. Fitzgerald

One-half Washington Water Power Co.	$ 1,484.38
One-half $35,000.00	17,500.00

Total	$ 18,984.38

Agnes M. Derickson

Westinghouse	$ 88,112.50
Baltimore Trust Co. joint account	76,774.96
Baltimore Trust Co. joint account	91,924.41
Total	$ 256,811.87

Bethany Beach Fire Company

Cash	$ 5,000.00

Bascom Palmer Eye Institute

Cash	$ 5,000.00

Total items 1-8	$(1,986,870.13)
Gross estate	3,208,684.34
Share to Susan Donovan before taxes	$ 1,221,814.21
Federal estate tax	(946,312.82)
Delaware inheritance tax	(290,028.58)
Deficit	$ (14,527.19)

ESTATE OF MARY LOUISE HIEBER

Cash Needs Analysis

I. Cash needs of the Estate

A Internal Revenue Service

Tax per Form 706 (Estate Tax Return)	$946,312.82

	Paid with return (4/6/90)	(750,000.00)	
	Paid 5/4/90 (received by IRS 5/7/90)	(60,000.00)	
	Balance owed-Pay 5/31/90		136,312.
	Interest (estimate)		2,845.
B.	Estimated 1990 Form 1041 taxes		10,000.
C.	Estimated 1990 Form 400 taxes		2,000.
D.	Estimated additional legal fees		5,000.
E.	Reserve for additional estate and inheritance taxes		27,500.
F.	Specific charitable bequests		10,000.
G.	Specific bequests to individuals		35,000.
	Total cash needs of the Estate		$228,657.

II.	Cash and receivables of the Estate		
A.	Cash in bank (approximate)		$ 24,200.
B.	Refund due from Register of Wills upon final accounting		15,6 32.
C.	Due from sale of bonds (approximate)		36,300.
	Cash and receivables of the Estate		$ 76,132.

II I.	Cash shortfall prior to Register of Wills refund	
A	Total cash needs of the Estate	$228,657.
B	Cash in bank (approximate)	(24,200.
C	Due from sale of bonds (approximate)	(36,300.
	Cash shortfall	$168,157.
		say
		$170,000.

ESTATE OF MARY LOUISE HIEBER

Contributions Required From Heirs

Name of Beneficiary	Gross Share of Estate	%	Share of Cash Needed

1	John Scott Spargo	$388,998.00	19.67	$33,450.90
2	Grace Ann Spargo	388,998.00	19.67	33,450.90
3	Nan E. Beeks	338,356.50	17.11	28,097.20
4	John Wheeler Spargo	565,737.00	28.61	48,652.30
5	Sara P. Fitzgerald	18,984.38	.96	1,632.00
6	Robert H. Fitzgerald	18,984.38	.96	1,632.00
7	Agnes M. Derickson	256,811.87	12.99	22,084.70
	Total	$1,976,870.13	100.00	$170,000.00

August 22, 1990

EXHIBIT B

Mr. & Mrs. John S. Spargo

320 Hibiscus Drive

Ms. Susan H. Donovan

2972 Mayfair Court

Miami Springs, FL 33166

Clearwater, FL 34621

Ms. Nan E. Beeks

778 Winston Avenue

San Marino, CA 91108

Ms. Agnes M. Derickson

c/o Joseph Eisenger, Esq.

215 E. 68th Street

New York, N.Y. 10021

Mr. John Wheeler Spargo

3711 Center Way

Fairfax, VA 22033

Mr. & Mrs. Robert H. Fitzgerald

Box 333, Cedar Neck Road

Ocean View, DE 19970

RE: *Estate of Mary Louise Hieber*

*11 Dear Heirs of Mary Louise Hieber:
Following the May 16, 1990 letter to the heirs certain questions were raised concerning the calculation of the abatement set forth on the schedule dealing with contributions required from heirs. Additional research was performed and it was determined that, pursuant to Delaware law, specific bequests abate prior to specific devises. In layman's terms, this means that specific gifts of stock, cash and other property not constituting real estate must be "invaded" or abated prior to any abatement of real property gifts (gifts of real property are called "devises"). The net result of the above analysis is that the specific devise of the Parkwood Street real estate to John Scott Spargo and his wife Grace Ann Spargo, as to a one-half interest, and to John Wheeler Spargo, as to the other one-half interest, is not charged for the abatement.

Research also disclosed that the joint accounts owned by Mary Louise Hieber with Agnes Derickson, totalling approximately $168,000, are not subject to abatement.

We have enclosed with this letter a revised schedule of contributions required from heirs. As you can see, John Scott Spargo, Grace Ann Spargo, John Wheeler Spargo and Agnes M. Derickson had their share of cash needed reduced. Nan E. Beeks, Sara P. Fitzgerald, Robert H. Fitzgerald, Bethany Beach Fire Company and Bascom Palmer Eye Institute had their share of cash needed increased.

The personal representatives are now proceeding to liquidate the final assets held and to then make a final accounting prior to their petition for a decree of distribution. Should any of you have any questions, please do not hesitate to contact any of us.

ESTATE OF MARY LOUISE HEIBER

Revised Schedule of Contributions Required From Heirs

	Name of Beneficiary	Gross Share of Estate	%	Share of Cash Needed
1	John Scott Spargo	$168,498.00	18.018	$30,630.60
2	Grace Ann Spargo	168,498.00	18.018	30,630.60
3	Nan E. Beeks	338,356.50	36.18	61,507.70

			1	
4	John Wheeler Spargo	123,737.00	13.2311	22,492.70
5	Sara P. Fitzgerald	18,984.38	2.0300	3,451.00
6	Robert H. Fitzgerald	18,984.38	2.0300	3,451.00
7	Agnes M. Derickson	88,112.50	9.4222	16,017.40
8	Bethany Beach Fire Company	5,000.00	.5355	909.50
9	Bascom Palmer Eye Institute	5,000.00	.5355	909.50
	Total	$935,170.76	100.00	$170,000.00

All Citations

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